FILED
MAY 26 1915
JAMES D. MAHER
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

No. [redacted] 1[redacted]22 October Term, 1914.

Pennsylvania Railroad Company,
Plaintiff-in-Error,

vs.

W. F. Jacoby and Isaac C. Weber, Co-partners, trading under the firm name of W. F. Jacoby & Company,
Defendants-in-Error.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

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IN THE

Supreme Court of the United States.

October Term, 1914. No. 464.

PENNSYLVANIA RAILROAD COMPANY,
Plaintiff-in-Error,

vs.

W. F. JACOBY and ISAAC C. WEBER, co-partners, trading under the firm name of W. F. JACOBY & COMPANY,

Defendants-in-Error.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

The present proceeding is a petition for a certiorari from this Court to the United States Circuit Court of Appeals for the Third Circuit, to require that Court to send up the whole record and cause in the above case for the consideration of this Court in order that this Court may decide the whole matter in controversy in the same manner as if it had been brought into this Court for review by writ of error or appeal (Hopkins' Judicial Code, Sec. 239).

The reasons which are especially urged upon the attention of this Court are the long delay to which the

petitioners have already been subjected under the somewhat extended but necessary proceedings preliminary to establishing their claim, the fact that the questions certified to this Court have already been in effect decided in petitioners' favor by this Court, in recent decisions handed down by it in similar cases, and that the matters remaining in dispute, while readily determinable by this Court, may involve questions as to the construction of United States Statutes which would afford an opportunity for a further appeal to this Court, thus exposing the petitioners to further litigation and delay in the recovery of a claim which has already been adjudicated in their favor by the Interstate Commerce Commission and by the United States District Court for the Eastern District of Pennsylvania.

In order that this Court may fully understand the circumstances out of which this case arose, and the hardship to petitioners involved in further delay, it is proper to set forth briefly the facts.

The defendants-in-error, W. F. Jacoby and Isaac C. Weber, co-partners, trading in the coal business, under the firm name of W. F. Jacoby & Company (plaintiffs below, hereinafter called plaintiffs), were, from April 1, 1904, to October 18, 1905, engaged in operating a coal mine, known as Falcon No. 2, on a tract of bituminous coal land, situated in Bigler Township, Clearfield County, Pennsylvania, (Commission's Report, Record, p. 32).

The mine was fully equipped for operation, and on April 1, 1904, was provided with an underground electric system for hauling mine cars, had a first class wooden tipple and patent dump, an ample supply of mine cars and track facilities, and the grades favored the outward movement of loaded mine cars, and the mine was regarded as one of the best equipped mines in the District (Commission's Report, Record, p. 32).

The coal in the Falcon No. 2 mine was accepted as a very superior grade of steam coal, and was readily marketable, and was shipped to other States than Pennsylvania, in interstate commerce. In 1904 there were about 100 acres of coal remaining in the tract, (Commission's Report, Record pp. 31-32). The rated capacity of the mine made by the Pennsylvania Railroad Company, (defendant below, hereinafter called defendant), during the period from April 1st, 1904, to October 18th, 1905, as the basis of proportional car distribution, was 450 tons a day, (Record, p. 18), and the actual average output capacity of the mine was 600 tons a day (Record, pp. 19, 33). During the period from April 1st, 1904, to October 18th, 1905, the Pennsylvania Railroad Company was a common carrier and engaged in the transportation of coal in interstate commerce, and, for the purpose of making a pro rata distribution of cars to mines in the coal fields, it divided its coal territory into Coal Districts served by the Divisions of its Railroad (Record, p. 94), in one of which Coal Districts, known as the Clearfield District, served by the Tyrone Division, the Falcon No. 2 mine was situate. On the same Division and in the same Coal District, there were a number of other mines, belonging to the Berwind-White Coal Mining Company, the Lehigh Valley Coal Company and other mine operators, competing with Jacoby & Company. The mines of the Lehigh Valley Coal Company were on a different branch of the Pennsylvania Railroad, known as the Snowshoe Branch, but were in the same Coal District and on the same Tyrone Division; these mines paid the same rates, and were carried on the same car distribution sheet as Falcon No. 2, (Record, pp. 94, 97, 99, 106). During the period from April 1st, 1904, to October 18th, 1905, the Falcon No. 2

mine, though in operation and demanding cars continually, received far less car service than its rated capacity entitled it to, and also far less car supply than was given by the Pennsylvania Railroad Company during the same period to other mines in the same Coal District and on the same Division above mentioned, of a similar or lower rated capacity and with similar or inferior facilities for mining and loading coal, and was thereby prevented from mining and shipping coal which it was entitled to ship to fill its contracts, and from accepting other available and profitable contracts, and from obtaining and fulfilling other contracts which it could have obtained and fulfilled.

In consequence thereof, the Falcon No. 2 mine was greatly hampered; its employes were forced to leave and seek other employment, and its cost of operation per ton materially increased. Jacoby & Company's business also suffered by reason of inability, due to car shortage, to accept or promptly fulfill contracts at Falcon No. 2 mine, and in October, 1905, they were obliged to go out of business and sell the mine.

On the —— day of June, 1907, the plaintiffs (defendants-in-error here) filed a complaint with the Interstate Commerce Commission, averring that the Pennsylvania Railroad Company, the defendant, (plaintiff-in-error here) had been guilty of unjust and unlawful discrimination against plaintiffs and in favor of other coal operators in the Clearfield District and on the Tyrone Division, in the distribution of coal cars, during the period from April 1, 1904, to October 18, 1905, and had also been guilty of other unjust and unlawful discriminatory practices against plaintiffs in distributing coal cars among its several Divisions, to the prejudice of the Tyrone Division and to the plaintiffs as coal operators and shippers on such Division.

The complaint was duly investigated and heard by the Commission, and on March 7, 1910, the Commission filed a report (Record, p. 31), finding that the defendant had been guilty of unjust and unlawful discrimination, in violation of the Act to Regulate Commerce, in both the respects charged.

On page 64 (Record), the Commission found:

> "But Falcon No. 2 was not placed on an equal footing with the mines of the Berwind-White Coal Mining Company in the matter of the distribution of the defendant's available coal car equipment during the period of this action." (Record, p. 64.)

And in referring to the "special allotment of 500 cars daily" to the Berwind-White Coal Mining Company, which took that number of cars out of the equipment for pro rata distribution to the Tyrone Division, the Commission finds (Record, p. 64):

> "We see no grounds upon which it can be justified by the Commission. On the contrary, it must be condemned in strong terms as an undue preference of one company and district and an undue discrimination against coal operations in another district."

And the Commission further found, (Record, p. 65):

> "For the reasons explained at some length in that case" (Hillsdale Coal & Coke Co. vs. P. R. R. Co.), "those rules" (referring to the rules complained of by Jacoby & Company) "operated as an undue discrimination against these complainants, and we so find. But for the present and for the reasons there explained we shall limit our order to a finding that in the several respects here mentioned the defendant was guilty of a discrimination against these complainants leaving for de-

termination after further argument the question of the extent to which the complainants may have been damaged thereby."

And on the same day, to wit, March 7, 1910, the Commission issued an order, (Record, p. 36), in which the nature of the practices complained of on the Tyrone Division were set forth, and it was

> "*Ordered*, that the said rule, regulation and practice of the defendant in that behalf unduly discriminate against the complainants and other coal operators similarly situated, and is in violation of the third section of the Act to Regulate Commerce." (Record, pp. 37, 66.)

The order then requires the defendant to cease and desist "from any practice and to abstain from maintaining any rule or regulation that does not require it to count all such assigned cars against the regular rated capacity of the particular mine or mines receiving such cars in the same manner and to the same extent and on the same basis as unassigned cars are counted against the rated capacity of the mines receiving them."

The question of "damages claimed by the complainants" was deferred by the order, "pending further argument in the premises".

Subsequently, on March 11, 1912, the Commission filed a Supplemental Report (Record, p. 14), which contained the further findings of the Commission as to the complaint of Jacoby & Company (Record, p. 18). In this Supplemental Report the Commission found:

1. "We find that by reason of the discriminations ascertained and set forth in our report in Jacoby vs. P. R. R. Co., 19 I. C. C. 392, the complainants *were dam-*

aged to the extent of $21,094,39, *which they are entitled to recover with interest from June* 28, 1907." (Italics ours.)

2. "(a) That the fair rating of the mine for the time in question, as fixed by the defendant and not objected to by the complainants, was 450 tons per day."

3. "(b) That during the period from April, 1904, to March 31, 1905, the mine was operated 275 days, and that during the second period named on the exhibits, from April 1 to October 18, 1905, it was operated 138¼ days."

4. "(c) That during the first of these periods 38,714.23 tons were actually shipped from Falcon No. 2, and during the second period 17,973.88 tons; that if the complainants had received their fair share of the cars available for distribution the mine would have made additional interstate shipments and sales to the extent of 35,412.02 tons and 19,104.77 tons during the respective periods."

5. "(d) That the average selling price of the complainants' product for the first period was $1.212 per ton, and in the second period $1.1670; that the cost of production, based on economical operation of the mine, with a fair car supply, would have been 92 cents during the entire period of the action; and that the profit during the first period would therefore have been 29.2 cents and during the second period 24.7 cents per ton. This measures *the loss on the tonnage which the complainant was unable to ship.*" (Italics ours.)

6. "(e) That the actual cost of production is shown by the record as $1.016 per ton during the first period and $1.049 per ton during the second period,

making an excess of 9.6 cents and 12.9 cents for the respective periods in the actual cost of production under the conditions obtaining, as compared with what would have been the cost based *on a fair car supply*, as heretofore stated. This is the *basis* adopted for computing *the loss sustained by these complainants in diminished profits on the coal actually shipped during the period in question.*" (Italics ours.)

The Commission then finds that the complainants sold their mine and realized a profit of $7,500 over the purchase price which they had paid, but the Commission does not undertake to say that this amount or any part of it should be deducted from the amount of reparation awarded.

On the same day, to wit, March 11, 1912 (Record, p. 26), the Commission entered its order, making its original report and supplemental report a part thereof, in which it "authorized and directed" the defendant, Pennsylvania Railroad Company, "to pay unto complainant, W. F. Jacoby and Isaac C. Weber, trading as W. F. Jacoby & Company, on or before the 1st day of June, 1912, the sum of $21,094.39, with interest thereon at the rate of 6 per cent. per annum from June 28, 1907, *as reparation for defendant's discrimination in distribution of coal cars, which discrimination has been found by this Commission to have been unlawful and unjust, as more fully and at large appears in and by said reports of the Commission.*" (Italics ours.)

The time within which the Commission ordered the defendant to pay to the plaintiffs the amount which they were found to have been damaged having expired, the plaintiffs availed themselves of the statutory proceedings provided by Section 16 of the Act to Regulate Commerce, and filed a petition in the District Court of the United States for the Eastern District of Pennsyl-

vania, "setting forth briefly the causes for which he claims damages and the order of the Commission in the premises," and praying the Court to enter a judgment in their favor against the defendant for the amount which plaintiffs had been damaged, as set forth in the reports and orders of the Commission which were filed with the petition as a part thereof.

This was the "petition" which by Section 16 of the Act is spoken of as "a petition *for the enforcement of an order for the payment of money*," and which is required to "be filed in the Circuit Court or State Court within one year from the date of the order, and not after."

A demurrer was filed by the defendant to the petition on September 18, 1912, and on the 12th of November, 1912, the Court handed down an opinion, overruling the demurrer; the defendant pleaded "not guilty," and on the 3d of March, 1913, the cause was tried by a jury. On the trial of the cause the plaintiffs, Jacoby & Company

1. Offered in evidence the original report of the Interstate Commerce Commission, finding that the defendant had been guilty of unjust discrimination against the plaintiffs, and read to the jury only the pertinent part of said report (Record, pp. 61 to 65, inclusive). This report was offered for the purpose of showing that the Commission had found that the rules of car distribution which were put into effect and maintained by the defendant during the period covered by the complaint, unjustly discriminated against the plaintiffs, in violation of Section 3 of the Act.

2. Offered in evidence the supplemental report of the Commission as to discrimination, and the fact and

amount of damage suffered by the plaintiffs. (See Record, pp. 67-68.)

3. Offered in evidence the order of the Commission requiring the defendant to pay to the plaintiffs the sum of $21,094.39, with interest thereon at the rate of 6 per cent. per annum from June 20, 1907, "as reparation for defendant's discrimination in distribution of coal cars, which discrimination has been found by this Commission to have been unlawful and unjust, as more fully and at large appears in and by said reports."

The plaintiffs then showed that no part of the award of the Commission had been paid, and that the report and supplemental report of the Commission and its two orders were duly served upon the Pennsylvania Railroad Company.

The defence contended that the reports and findings of the Commission were not entitled to be received or admitted in evidence. The defence also offered in evidence certain data showing the number of privately owned cars of shippers and the number of fuel cars of the defendant and of other railroad companies in the Tyrone Division and contended that defendant had received the full quota of cars to which they were entitled. The Court charged the jury (Record, p. 124) in part as follows:

> "The Commission has decided the manner of distribution of coal cars, and that is a question with which you have nothing to do. Their findings on that subject are conclusive, as far as this Court and jury are concerned." (Record, p. 127.)

And further:

> "The Commission's findings of fact you have heard read, and they find among other things that

the practices employed in the distribution of coal cars in this particular case were unjust and discriminatory." (Record, p. 125.)

And further, the Court charged the jury that the finding of the fact and amount of damages which the plaintiffs had suffered, by reason of the unlawful discrimination of the defendant, was *prima facie* correct, and "it is entitled to weight with you as being correct on its face, unless the defendant has produced evidence to show that some other state of facts existed, and that the plaintiffs have not suffered the damages which the Commission has awarded to them." (Record, p. 127.)

Thereupon, the jury, on the 4th day of March, 1913, found a verdict in favor of the plaintiffs, and assessed their "damages in the sum of $28,572.54." The defendant moved to set aside the verdict and for judgment *non obstante veredicto,* both of which motions were overruled by the Court (Record, p. 142), and on the 19th of May, 1913, the Court entered judgment for plaintiffs and also entered an order under Sections 8 and 16 of the Act to Regulate Commerce, directing that counsel for plaintiffs be allowed a counsel fee of $2500 for services in the proceeding before the Interstate Commerce Commission, and a further fee of $2500 for services in the proceeding in the District Court, to which allowances an exception was granted (Record, p. 142).

To reverse this judgment a writ of error was sued out, based upon a number of assignments of error (Record, pp. 145-155), which, however, reduce themselves to several main matters:

(1) What was the standing and effect of the reports and findings of the Commission as evidence in the District Court?

(2) Should the Court, in view of the evidence presented, have taken the case from the jury, or instructed them that the plaintiffs' evidence was completely rebutted and that plaintiffs were not entitled to recover the amount claimed?

(3) What counsel fees could properly be awarded by the District Court in this case?

All these matters were matters depending primarily upon the construction of United States statutes.

The first of these matters had been before the Circuit Court of Appeals for the Third Circuit in the cases of *Meeker, surviving partner, &c. vs. Lehigh Valley R. R. Co.* and *Meeker vs. Lehigh Valley R. R. Co.* (reported 211 Fed., 785), and the Court of Appeals in the above cases had, on very similar facts, reversed a judgment of the District Court. However, the Circuit Court of Appeals certified to this Court the questions set forth in the certificate filed with the petition in this case for certiorari (see Petition, p. 8 et seq.), as follows:

(1) Were the two reports of the Commission as a whole (including the finding and the order quoted above) *prima facie* evidence of the matters therein contained?

(2) Were the finding and the order quoted above —or was either of them—*prima facie* evidence of themselves, or of itself, that the defendant had become liable to Jacoby & Co. in some amount by the discriminating practices referred to?

(3) If the finding and the order—either, or both, of them—were *prima facie* evidence that the defendant had become liable in some amount, were they—or

was either of them—*prima facie* evidence also of the amount of such damage?

This Court filed its opinion in the Meeker cases (reported 236 U. S. 412, 434), which had been brought up by certiorari, in which this Court in effect decided in petitioners' favor the very points certified to it in this case. At the same time, this Court passed adversely to the granting of counsel fees for services rendered before the Interstate Commerce Commission.

The only questions remaining, therefore, to be determined are questions arising upon the refusal of the trial court to affirm certain points presented by the defendant, and upon certain parts of the charge of the Court to the jury. As the case, however, arose under the provisions of the Act to Regulate Commerce and the charge and requests for charge naturally bore upon the construction of that Act, these matters might afford ground, after the answer of this Court to the questions here certified and an adjudication had by the Circuit Court of Appeals, for a further appeal to this Court.

It is submitted that a grave hardship would be inflicted upon petitioners by requiring them to again take their place upon the list of the Circuit Court of Appeals, to abide a decision in that Court, and thereafter to await the determination of a further appeal to this Court upon matters which could be now readily determined by this Court. In 1905 these petitioners were injured and virtually forced out of business by the acts of the defendant, and they have now waited nearly ten years to secure the reparation to which the Interstate Commerce Commission and a jury have both held that they were entitled. The case seems to be one which would peculiarly meet the reason of the Rule of this Court providing for a certification of the whole record here for final determination. There

could be no hardship to defendant in such certification, for unless defendant seeks delay for the sake of delay, it would be equally concerned to secure an end to litigation which has already extended over eight years.

If this cause should take the ordinary course, the petitioners, if finally successful, may be delayed in obtaining the reparation to which they conceive themselves justly entitled, for several years, while should the cause for any reason be decided adversely and the case remitted for a new trial, there is no method of arriving at the length of further delay before the final adjudication of the cause.

The petitioners' business was destroyed and they themselves practically ruined by the acts of the defendant. In the case of one of them the litigation is being conducted by a committee of creditors. Every delay to which they are subjected exposes them to a grievous disadvantage and to expense and trouble for which they cannot be compensated in costs. All the matters of defence available to their suit are in the record, their counsel having refrained from objection to any evidence offered by defendant on the trial of the case. The issues presented are few and clear, and can be now readily adjudicated.

It is therefore earnestly submitted that the case is one which invokes the recognized powers of this Court to hear and consider all the matters involved thereon as if on writ of error or appeal, and that this Court should grant the order prayed and finally determine the right of the petitioners to the award made in their favor by the Interstate Commerce Commission in March, 1912, and the verdict rendered in their favor for the same amount in March, 1913.

Wm. A. Glasgow, Jr.,
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